Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, affiliated with the United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, AFL-CIO,

Petitioner,

v.

INDEPENDENT SPRINKLER CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under what circumstances may a successor employer be required to arbitrate under its predecessor's agreement with the union?

2. Is Section 301(a) of the Labor Management Relations Act of 1947 applicable only where the parties to the "contract" enjoy a collective bargaining relationship?

3. Is workforce continuity, the key element of successorship status, determined by the same standard in NLRB and Section 301 cases or by different standards?

PARTIES BELOW

The Plaintiff and Appellee in the proceedings below was:

> Road Sprinkler Fitters Local Union No. 669, affiliated with the United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, AFL-CIO.

The Defendant and Appellant in the proceedings below was:

> Independent Sprinkler Corp.

The following companies were Defendants in the proceedings before the District Court and appealed from the District Court Order, but withdrew their appeals and did not participate in the proceedings in the Court of Appeals:

> Moore Pipe & Sprinkler Co.
> Independent Sprinkler and Fire Protection Co.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Road Sprinkler Fitters Local Union No. 669 ("Local 669") respectfully petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Eleventh Circuit reversing the District Court's Order directing Independent Sprinkler Corp. to arbitrate a dispute with Local 669.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is reported at 10 F.3d 1563 and is reproduced at App. 21a. The decision denying the Petition for Rehearing and Suggestion for Rehearing En Banc is not reported and is reproduced at App. 32a. The Mandate is reproduced at App. 33a.

The decision of the United States District Court for the Middle District of Florida is reported at 136 LRRM 2693 and is reproduced at App. 1a.

JURISDICTION

The Court of Appeals issued its decision on January 7, 1994. The court denied the Petition for Rehearing and Suggestion for Rehearing En Banc on April 8, 1994. The Court of Appeals' Mandate became effective on May 2, 1994. This Petition is timely filed with this Court under 28 U.S.C. §2101(c). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

29 U.S.C. §185(a):

(a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the

amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

A. The Facts[1]

Local 669 is a national labor organization representing employees who install and maintain automatic fire protection systems. [App. 35a]. Moore Pipe & Sprinkler Co. ("Moore Pipe") has been a sprinkler contractor with a long standing collective bargaining relationship with Local 669. [App. 36a]. At all material times, Moore Pipe has been owned by Williamson Feed Mills ("Williamson"), a parent corporation which was in turn owned by the Evans family including brothers Mack, Jerry and Randy. [App. 38a].

Williamson formed Independent Sprinkler & Fire Protection Co. ("Independent I") in 1982 to perform sprinkler installation work on a strictly nonunion basis. Moore Pipe and Independent I were commonly owned by Williamson and the Evans brothers until 1987. [App. 36a].

In 1985, Local 669 filed a grievance under Article 3 of its collective bargaining agreement claiming that Moore Pipe and Independent I were being operated as "single or joint" employers and that the economic terms of the Moore Pipe agreement were contractually applicable to all sprinkler

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[1]The District Court based its findings of fact upon stipulations which are reprinted here at App. 37a.

installation work performed by Independent I in Local 669's territorial jurisdiction. [App. 36a]. When Moore Pipe refused to submit the grievance to arbitration, Local 669 sued to compel arbitration of its grievance under Section 301(a) of the Labor Management Relations Act, 29 U.S.C. §185(a). [App. 37a].

The 1985 suit was resolved on April 16, 1987, together with the underlying grievance, by a written settlement agreement executed by Jerry Evans on behalf of Moore Pipe and by Randy Evans as President of Independent I. Moore Pipe and Independent I agreed, *inter alia*, that from April, 1987 until March, 1991, any sprinkler installation work within Local 669's territorial jurisdiction would be performed by Moore Pipe's bargaining unit employees represented by Local 669. The Settlement Agreement expressly bound Moore Pipe and Independent I and "... the *successors*, assigns, heirs, trustees and administrators of any party hereto" and, by its terms, was enforceable by arbitration. [App. 37a (emphasis supplied)].[2]

In the summer of 1987, several months after executing the settlement agreement, Williamson decided, allegedly for economic reasons, to close Independent I. On October 30, 1987, Independent I ceased operations. [App. 39a].

In August, 1987, simultaneous with the decision to close Independent I, Randy Evans sold his stock in

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[2]The settlement agreement contained a footnote at the reference to "successors" providing, essentially, that Independent I could be sold to a *bona fide* purchaser without regard to the settlement. No one has claimed that Independent II was a bona fide purchaser of Independent I.

Williamson back to the corporation and used the proceeds to capitalize his new company, Independent Sprinkler Corp. ("Independent II"). [App. 37a-38a]. Independent II was engaged in the same business as Independent I. During Independent I's phase out period, Independent I and Independent II shared officers, directors,[3] and management[4] and occupied the same offices. [App. 39a-42a]. In addition, Independent II purchased a number of items of office equipment and supplies from Independent I and assumed the leases of some but not all of Independent I's vehicles. [App. 42a, 44a].

On Friday, October 30, 1987, the last day of its active operations, Independent I laid off all of its employees. On the next business day, Monday, November 2, Independent II began operations. Of Independent II's initial workforce of thirty-five employees, thirty-two were "alumni" of Independent I. [App. 39a]. Six months later, Independent II still employed thirty-five employees, twenty-five of whom were former Independent I employees. [App. 39a].

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[3]Randy Evans and Robert Matthews were the largest shareholders in Independent II. Evans was a director of both Independent I and Independent II and served as President for both companies simultaneously. Matthews was director of both Independent I and Independent II and served as Vice President for both companies simultaneously. [App. 39a-41a].

[4]Matthews had the authority to hire, fire, promote, and layoff employees at Independent I, and retained the same authority at Independent II. William Taylor was the administrator for Independent I and the comptroller for Independent II. Grace Cobb was the secretary for both companies, and Danny Wilkerson, James Roberts and Dan Thomas held supervisory positions at both companies. [App. 39a-41a].

On November 2, 1987, the first day of its active operations, Independent II signed a contract with Independent I by which it obtained the right to complete thirty-seven unfinished Independent I construction jobs in return for the money still owed on the contracts, in excess of $500,000. [App. 15a].

Independent II's employees continued to work on construction jobs in the field, in the same geographic locations as did the employees of Independent I. These jobs included many of the same projects formerly under contract to Independent I. [App. 43a].

From November 2, 1987 until the expiration of the Settlement Agreement in March of 1991, Independent II performed substantial sprinkler work in Local 669's jurisdiction on substandard terms and conditions of employment, and in direct contravention to the terms of the settlement agreement.

B. The Litigation

On July 25, 1989, Local 669 alleged that the settlement agreement had been violated through the post-settlement formation of Independent II to perform work in Local 669's territorial jurisdiction in violation of the settlement. After unsuccessfully attempting to resolve the dispute informally, Local 669 demanded that Moore Pipe, Independent I and Independent II submit its claim to binding arbitration under the settlement agreement, which expressly stated that

> [t]he unresolved issues shall be promptly referred to the Special Arbitrator pursuant to Article 3 of the Local 669 NFSA agreement for final and binding arbitration under Article 25 of the Agreement.

Moore Pipe, Independent I and Independent II all refused to submit this dispute to arbitration and a second Section 301 suit to compel arbitration was filed on November 8, 1989.

On February 27, 1991, on the basis of stipulated facts, the District Court granted Local 669's motion for summary judgment and issued an order compelling Moore Pipe, Independent I and Independent II to submit the dispute to arbitration.[5] The District Court concluded that Independent II was the successor to Independent I under federal labor law [App. 16a] and was obligated to arbitrate the contractual dispute of alleged breach of settlement [App. 17a].

On January 7, 1994, the Eleventh Circuit reversed the District Court and concluded that Independent II was not obligated to arbitrate the dispute over compliance with the settlement agreement. The Court of Appeals did not dispute the factual basis for the District Court's conclusion that Independent II was the successor of Independent I. Rather, the Eleventh Circuit held that, as a matter of law, the successorship doctrine had "no application" to the case,

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[5]Motions for a stay of arbitration pending appeal were denied by the district court on May 20, 1991 and by the Eleventh Circuit on July 3, 1991. On February 13, 1992 the Special Arbitrator rendered a decision on the issue of liability in favor of Local 669 and against Moore Pipe, Independent I and Independent II.

because Local 669 and Independent I had no collective bargaining relationship and because Independent II did not employ "all" of Independent I's employees. [App. 28a].

REASONS FOR GRANTING THE WRIT

I. A Conflict in the Circuit Courts Exists Regarding a Successor's Duty to Arbitrate

This Petition presents a recurring issue of successorship law this Court considered but left unresolved in *Howard Johnson Co., Inc. v. Hotel and Restaurant Employees*, 417 U.S. 249 (1974), and which has since generated a conflict in the circuits: under what circumstances may a successor be bound to arbitrate a grievance arising under its predecessor's agreement with the union. Given the significance of this issue and "the importance of the successorship issue in labor law" *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 36 (1987)[6], the time has come to resolve this conflict.

In *Howard Johnson*, the Court recognized that a successor could be compelled to arbitrate under its predecessor's labor agreement where there is "'substantial

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[6]Successorship clauses are commonly found in collective bargaining agreements, Bureau of National Affairs, **Basic Patterns in Union Contracts** 8 (8th ed. 1975) (at least 22% of agreements sampled in 1975), and are a mandatory subject of bargaining under the National Labor Relations Act. *Mine Workers (Lone Star Steel Co.)*, 231 NLRB 573 (1977), *enforced in relevant part and remanded* 639 F.2d 545 (10th Cir. 1980), *cert. denied*, 450 U.S. 911 (1981).

continuity of identity in the business enterprise' before and after a change in ownership." *Id.* at 258 n.3 and 263-64 quoting *John Wiley & Sons, Inc. v. Livingston*, Inc., 376 U.S. 543, 551 (1964).

In this case, the Eleventh Circuit read *Howard Johnson* to limit *Wiley* to a situation in which the predecessor was party to a collective bargaining agreement or relationship with the Union and the successor has hired all of the predecessor's employees. [App. 28a]. The Eleventh Circuit's narrow reading of *Wiley* directly contradicts previous decisions by the Second, Third, Fifth and Seventh Circuits.[7] *Graduate Plastics Co., Inc. v. Auto Workers, District 65*, 991 F.2d 997 (2d Cir. 1993); *Operating Engineers Local 150 v. Centor Contractors, Inc.*, 831 F.2d 1309 (7th Cir. 1987); *Steelworkers v. United States Gypsum Co.*, 492 F.2d 713, 725-27 (5th Cir.), *cert. denied*, 419

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[7]The Eleventh Circuit's refusal to require arbitration pursuant to Section 301 based upon the lack of a direct bargaining relationship between Independent I and the Union "ignores the fact that the settlement agreement itself is a creature wholly begotten by the CBA ... The settlement agreement was the settlement of a grievance filed ... by the Union pursuant to the dispute resolution procedures of the CBA." *Jones v. General Motors Corp.*, 939 F.2d 380, 383 (6th Cir. 1991). Independent I was included in the settlement agreement, not because of a direct bargaining relationship with the Union, but because its operations directly undermined the relationship between the Union and Moore Pipe, a commonly owned related company, allegedly in violation of the collective bargaining agreement. [App. 2a-3a, 36a-37a].

U.S. 998 (1974); *Teamsters Local 249 v. Bill's Trucking, Inc.*, 493 F.2d 956 (3d Cir. 1974).[8]

On facts strikingly similar to those in this case, the Seventh Circuit held that a partnership was the successor to a corporation and was bound by an arbitration award between the corporation and its union.[9] The Seventh Circuit explained that the successorship and alter ego

> doctrines are usually applied to determine whether one employer is required to bargain with a union that represented a former employer's employees. However, we see no reason the same principles should not be applicable to enforcement of arbitration

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[8]The Ninth Circuit has also suggested that a successor could be compelled to arbitrate and that an arbitrator, but not the court, could determine whether to impose the substantive terms of the agreement on the successor. *Bartenders Local 340 v. Howard Johnson Co.*, 535 F.2d 1160, 1163 (9th Cir. 1976). *See also United Food & Commercial Workers Local 1529 v. Chambers Big Star No. 52, Inc.*, 124 LRRM 2120, 2125 (W.D. Tenn. 1986) (arbitration compelled). *See generally* Note & Comment, *The Efficacy of Successorship Clauses in Collective Bargaining Agreements*, 79 **Geo. L.J.** 1549, 1555-1556, 1558-1562 (1991); Crystal and Brodecki, *Are Successors and Assigns Clauses Really Binding?*, 38 **Lab. L.J.** 547, 548-550 (1987).

[9]The court held that the partnership was alternatively liable as a successor and as an alter ego of the corporation. *See also Steelworkers v. Connors Steel Co.*, 855 F.2d 1499, 1505-1508 (11th Cir. 1988), *cert. denied* 489 U.S. 1096 (1989). Thus, the Eleventh Circuit's implication that the Union litigated on the wrong theory and should have pursued Independent II as an alter ego rather than as a successor [App. 28a-30a] was error.

> awards that are "part and parcel of the collective bargaining process itself."

Centor Contractors, 831 F.2d at 1313, quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). *See also Machinists Lodge 1266 v. Panoramic Corp.*, 668 F.2d 276, 287 (7th Cir. 1981).

Similarly, in *Graduate Plastics*, the Second Circuit found that "there was a sufficient basis to find that GPC was Stotter's successor and was obliged to arbitrate the Union's claims under the Contract, and accordingly, that the arbitrator had jurisdiction to resolve the dispute." 991 F.2d at 1002.

Also relying on *Wiley*, the Third Circuit, in *Bill's Trucking*, *supra*, explained the possible consequences of a contrary view:

> an employer dissatisfied with the terms of a validly negotiated labor agreement might seek to avoid them by a sale of his business to a third party, in effect working a unilateral termination of the employees' contract rights. This Court and other courts, aware of such possibility, have consistently held, in breach of contract cases under section 301, that a finding of "substantial continuity" may warrant the conclusion that a successor is bound by the terms of a prior employer's labor contract.

493 F.2d at 960-62. *See also Steelworkers v. Reliance Universal, Inc.*, 335 F.2d 891, 892-93, 895 (3d Cir. 1964).[10]

The view of the Second, Third, Fifth and Seventh Circuits, that a successor employer may be obligated to arbitrate under its predecessor's collective bargaining agreement even if not otherwise obligated by that agreement, is predicated upon the Court's decision *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972). In *Burns*, the Court said that *Wiley*

> held only that the agreement to arbitrate ... survived the merger and left to the arbitrator, subject to judicial review, the ultimate question of the extent to which, if any, the surviving company was bound by the other provisions of the contract.

By contrast, the Eleventh Circuit disallowed an arbitral determination of the merits of the Union's claim against Independent II under the settlement contrary to the consistent policy of the Court favoring arbitration. *E.g.*, *Paperworkers v. Misco, 484 U.S. 29, 35 (1987).*

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[10]A corollary principle, that an "innocent" successor which has not itself committed any unfair labor practices may be required to remedy the statutory violations of its predecessor, was reaffirmed in *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 176 (1973). The *Golden State* principle has also been applied to impose an arbitration remedy upon a successor. *Textile Workers v. Cal Optics Corp.*, 464 F.2d 577, 578 (3d Cir. 1972).

In this context, the District Court's detailed findings and conclusions regarding the interrelationship between Independent I and Independent II [App. 15a-16a], which were not disturbed by the Eleventh Circuit, are worthy of reiteration:

> the Court finds that there was substantial continuity between the two enterprises. There is no disagreement that the business of the two enterprises is identical. While Independent II did not hire the majority of Independent I's workforce, the overwhelming majority of Independent II's workforce was previously employed by Independent I. Independent II began active operations the next business day after Independent I ceased active operations. Independent II, as subcontractor, was authorized to complete thirty-seven of Independent I's construction contracts. Former Independent I employees working on those thirty-seven projects, as well as other projects obtained by Independent II, could understandably view their job situation as essentially unaltered. Based on the totality of the circumstances, the Court finds that Independent II is a successor corporation to Independent I.

Applying the Second, Third, Fifth and Seventh Circuit standards to these undisputed facts, Independent II would be required to arbitrate. The Court should grant review to resolve the conflicting circuit decisions on the issue of when a successor may be bound to arbitrate under the predecessor's contract.

II. The Eleventh Circuit's Decision on the Scope of Section 301 is Contrary to a Majority of the Circuit Courts and Degrades Section 301 as a Forum For Resolving Labor Disputes

Federal labor policy, as expressed in Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. §185(a), strongly favors judicial enforcement of agreements between unions and employers that resolve labor disputes and which are therefore "significant to the maintenance of labor peace." *Retail Clerks Int'l Ass'n v. Lion Dry Good, Inc.*, 369 U.S. 17, 27 (1962). The decision below is in conflict with a majority of the appellate courts which have interpreted *Lion Dry Goods* to mandate a liberal construction of the term "contracts" in Section 301 to include agreements other than traditional collective bargaining agreements. *Hotel Employees Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561, 566 (2d. Cir. 1993); *Hotel Employees Local 2 v. Marriott Corp.*, 961 F.2d 1464, 1466 n. 3 (9th Cir. 1992); *Textile Workers v. Facetglas, Inc.*, 845 F.2d 1250, 1253 (4th Cir. 1988); *Smith v. Kerrville Bus Co.*, 709 F.2d 914, 920 (5th Cir. 1983); *Adamszewski v. Machinists Local 1487,* 496 F.2d 777, 786 (7th Cir.) *cert. denied*, 419 U.S. 997 (1974)

The majority view is that

> Section 301 must be broadly construed to encompass any agreement, written or unwritten, formal or informal, which functions to preserve harmonious relations between labor and management.

Smith v. Kerrville Bus Co., *supra*, 709 F.2d at 920.

Under this rule, grievance and strike settlements have long been recognized as enforceable "contracts" under Section 301. *E.g.*, *Bakers Union Factory No. 326 v. ITT Continental Baking Co.*, 749 F.2d 350, 354-355 (6th Cir.1984) (grievance settlement); *Mail Handlers Local 305 v. United States Postal Service*, 594 F.2d 988, 992 (4th Cir. 1979) (same); *Frech v. Pensacola Steamship Ass'n.*, 903 F.2d 1471, 1474-75 (11th Cir. 1990) (strike settlement); *Retail Clerks Int'l Ass'n v. Lion Dry Goods, Inc.*, 341 F.2d 715, 718 (6th Cir.), *cert. denied* 382 U.S. 839 (1965) (same). *See also*, *United Aircraft Corp.*, 192 NLRB 382, 387 (1971), *modified sub nom Machinists v. United Aircraft Corp.*, 534 F.2d 422 (2d Cir.1975), *on remand* 247 NLRB 1042 *enf'd.* 661 F.2d 910 (2d Cir. 1981).

Local 669's attempt to enforce its grievance settlement agreement against the three employers below, pursuant to the arbitration and "successors" clauses in the agreement, was rebuffed by the Eleventh Circuit, solely with respect to the claim against Independent II, on the theory that:

> [t]here has been no collective bargaining *relationship* between the union and

> Independent I to be "passed on" to Independent II as successor to Independent I.... The successorship doctrine may not be utilized to force an alleged successor employer ... into a collective bargaining relationship in which its alleged predecessor ... was not a participant.

[App. 26a-27a (emphasis is the original)].[11]

By interjecting the precondition of a "collective bargaining relationship" between the parties upon enforcement of a grievance settlement agreement under Section 301, the Eleventh Circuit mirrored a decision of the Sixth Circuit. *Electrical Workers v. C & M Electric*, 734 F.Supp. 285 (N.D.Ohio 1990), *aff'd.* 922 F.2d 841 (6th Cir. 1991).[12] In *C & M Electric*, the agreement, between a picketing union and a construction contractor, was deemed unenforceable under Section 301 because it had not been

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[11]Contrary to the Eleventh Circuit opinion, however, Local 669's grievance did not seek to impose union representation or membership or the substantive terms of its collective bargaining agreement upon Independent I, much less Independent II. *See Virginia Sprinkler Co., Inc. v. Plumbers Local 669*, 868 F.2d 116, 119-20 (4th Cir. 1989).

[12]An earlier decision of the Second Circuit would impose a similar implied restriction upon the enforcement of a Section 301 "contract," that it control the terms and conditions of the employer's relationship with its employees. *District 2, Marine Engineers Beneficial Association v. Grand Bassa Tankers, Inc.*, 663 F.2d 392, 397 (2d Cir. 1981).

entered into between a union and a company employing members of the union. 734 F.Supp. at 289.[13]

The Eleventh and Sixth Circuits' emphasis upon the underlying bargaining relationship between the union and the employer misapprehends the

> critical distinction between an employer's obligation under the [National Labor Relations Act] to bargain with the representative of a majority of its employees and its duty to satisfy lawful, contractual obligations....

Jim McNeff v. Todd, 461, U.S. 260, 267 and n.7 (1993)(holding Section 301 contracts enforceable in suit by minority union).

The minority view among the federal courts of appeals, exemplified by the decision below, is thus in conflict with the Court's rulings, and substantially diminishes the applicability and utility of Section 301.

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[13]In this regard, the Eleventh and Sixth Circuits have read a requirement of privity into Section 301(a) which, in their view, should be read as follows:

> Suits for violation of contracts between an employer and a labor organization representing [*the employer's*] employees in an industry affecting commerce....

See also *Grand Bassa Steamship, supra*. This construction adds a substantive element to the "plain language" of the statute, and is contrary to existing appellate caselaw. *Hotel Employees Local 217 v. J.P. Morgan Hotel, supra*, 996 F.2d at 564-65.

> [F]ederal courts should enforce these agreements on behalf of or against labor organizations... Industrial peace can be best obtained only in that way.

Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455 (1957). The Court should grant review to establish uniformity of decisions on this important labor law issue.

III. The Decision Below is Contrary to the Precedent of the Court and Recreates a Conflict in the Circuit Courts Regarding the Method for Determining Workforce Continuity In Successorship Cases

Workforce continuity is the "triggering" fact in successorship cases. *Fall River*, *supra*, 482 U.S. at 46. Confusion over the appropriate standard for measuring workforce continuity for successorship purposes was caused by inconsistent language in *Burns* and *Howard Johnson*. 482 U.S. at 46, n.12. The quandary was ultimately resolved by consensus among the NLRB and the circuit courts in favor of the *Burns* formulation: whether "a majority of the employees hired by the new employer" were former employees of the predecessor.

In concluding that Independent II was a "successor" and bound to arbitration under the settlement, the District Court expressly found that [App. 16a]:

> [w]hile Independent II did not hire the majority of Independent I's workforce, the overwhelming majority of Independent II's workforce was previously employed by Independent I.

The Eleventh Circuit did not contest these findings, but held that a successor's duty to arbitrate under *Wiley* arises only where "the original employer has disappeared and the new employer has hired *all* of the old employer's workers ...." [App. 28a (emphasis supplied)]. The Eleventh Circuit declined to order Independent II to arbitrate, reasoning that "Independent II has hired some *but not all* of Independent I's employees" [App. 28a].

The Eleventh Circuit thus requires a separate and substantially higher standard of workforce continuity in cases seeking a successor's arbitration under Section 301 than it requires in other successorship contexts under the National Labor Relations Act. *Computer Sciences Corp v. NLRB*, 677 F.2d 804, 806 (11th Cir. 1982); *Evans Services, Inc. v. NLRB*, 810 F.2d 1089, 1092 (11th Cir. 1987) (*Burns* method of determining workforce continuity applicable in NLRB successorship cases).

No precedent of the Court supports the application of a different method for determining workforce continuity dependent upon the forum or legal context in which the successorship issue arises. *Fall River* strongly militates against any such distinction. The issue was framed by the Court to be a single question, whether workforce continuity for successorship purposes should be resolved under *Howard Johnson*, a Section 301 arbitration case, or under *Burns*, a Section 8(a)(5) case. In describing the issue as having been

resolved, once and for all, in favor of the *Burns* standard, the Court never suggested that Section 301 and NLRA successorship issues might involve different standards of workforce continuity. 482 U.S. at 46, n. 12.

The Eleventh Circuit's distinction has not been acknowledged by other courts in Section 301 cases.[14] In *Smegal v. Gateway Foods of Minneapolis, Inc.*, 819 F.2d 191, 193-95 (8th Cir.), *cert. denied*, 484 U.S. 928 (1987), the Eighth Circuit rejected the notion of a different standard for Section 301 cases and applied the *Burns/Fall River* standard. The Second, Seventh and Ninth Circuits in *Graduate Plastics*, *Centor Contractors* and *Audit Services, Inc. v. Rolfson*, 641 F.2d 757, 762-63 (9th Cir. 1981), respectively, held a successor bound to arbitrate, or bound to the substantive terms of the predecessor's contract, without identifying the specific standard of workforce continuity applied.

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[14]The Eleventh Circuit decision finds some support in pre-*Fall River* Fifth Circuit *dicta*:

> As a matter of principle, since the duty to arbitrate arises from an application of the contract between the predecessor employer and his organized employees, the entity whose identity is to be the reference point for judging continuity ought to be the predecessor enterprise.

The court refused to compel arbitration where only 35 percent of the predecessor's employees were hired by the successor and no tangible assets were transferred. *Boeing Co. v. Machinists*, 504 F.2d 307, 319 (5th Cir. 1974), *cert denied*, 421 U.S. 913 (1975). However, Boeing did not even satisfy the *Fall River* standard of successorship.

The decision below recreates "confusion" in the circuit courts regarding the critical and recurring issue of the method by which workforce continuity is measured for successorship purposes under Section 301. Review is independently warranted on this basis.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Date: July 7, 1994

APPENDIX

District Court Decision

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

ROAD SPRINKLER FITTERS LOCAL UNION NO, 669, affiliated with the UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, Plaintiff, v. MOORE PIPE & SPRINKLER CO., INDEPENDENT SPRINKLER & FIRE PROTECTION CO. a/k/a INDEPENDENT PIPE & SPRINKLER CO., and INDEPENDENT SPRINKLER CORP., Defendants

Case No. 89-906-Civ-J-14

February 27, 1991, Decided
February 28, 1991, Filed

JUDGES: Susan H. Black, United States District Judge.

This case is before the Court on Defendant Independent Sprinkler Corporation's Motion for Partial Summary Judgment, filed on July 6, 1990; Motion for Summary Judgment of Defendants Moore Pipe & Sprinkler Co.[,] and Independent Sprinkler & Fire Protection Co., filed on September 20, 1990; and Plaintiff's Motion for Summary Judgment Against Defendants Moore Pipe & Sprinkler Co., Independent Sprinkler & Fire Protection Co.[,] and Independent Sprinkler Corp., filed on September

20, 1990. The parties filed responses in opposition to each of the motions.

On December 6, 1990, the Court heard oral argument on the motions. At that time, the Court ordered the parties to jointly submit a stipulated statement of facts, and to separately file their conclusions of law based upon the stipulated statement of facts. The parties have complied with that order.

The undisputed facts of the case are as follows. Road Sprinkler Fitters Local Union No. 669 [hereinafter "Local 669"] is a national labor organization representing employees engaged in the installation and maintenance of automatic fire protection systems in forty-eight states. Moore Pipe & Sprinkler Co. [hereinafter "Moore Pipe"] is engaged in the business of installing and maintaining fire protection systems in various states. Moore Pipe was incorporated in 1926, and has been a union contractor for many years. Independent Sprinkler & Fire Protection Co. [hereinafter "Independent I"], prior to October 30, 1987, was engaged in the business of installing and maintaining fire protection systems. Independent I was incorporated in 1982, and operated during its existence on a non-union basis.[1] Independent Sprinkler

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[1]Up until October 30, 1987, Moore Pipe and Independent I were operated as wholly owned subsidiaries of their parent company, Williamson Feed Mills, Inc. [hereinafter "Williamson"]. Prior to October 30, 1987, the stock in Williamson was owned by the Evans family. Brothers Mack, Jerry and Randy Evans owned twenty-five percent each, and the Evans family trust owned the remaining twenty-five percent. On October 30, 1987, Randy Evans sold all of his stock in Williamson back to the company for $258,814.97. Since that time the Williamson stock has been owned equally by Mack Evans, Jerry Evans and the Evans family trust. Randy Evans has not reacquired any interest in Williamson.

Corp. [hereinafter "Independent II"] was incorporated on August 28, 1987, and has operated on a non-union basis.

In August, 1985, Local 669 filed a grievance under Article 3 of its collective bargaining agreement with Moore Pipe, alleging that Moore Pipe and Independent I were single or joint employers within the meaning of Article 3, and that the economic terms of the agreement were applicable to the work performed by Independent I within Local 669's territorial jurisdiction. Local 669 ultimately brought an action in federal court to compel arbitration of its grievance. On April 16, 1987, a settlement encompassing both the pending suit and the underlying grievance was reached. The settlement agreement was signed by Moore Pipe and Independent I, and bound Moore Pipe to the national collective bargaining agreement in effect between the National Fire Sprinklers Association Inc., and Local 669, for the period April 1, 1988 through March 31, 1991.

During the summer of 1987, Mack Evans Jr., in his capacity as Chairman of the Board of Williamson, made the decision to close down the operation of Independent I, allegedly for economic reasons. Independent I ceased business operations on October 30, 1987, and has not actively engaged in business since then. All of its employees were laid off on October 30, 1987.

Independent II began operations on the following business day, November 2, 1987. On that date, it hired thirty-five employees, thirty-two of whom had previously been employed by Independent I. As of May, 1988, six months later, Independent II still employed thirty-five persons, twenty-five of whom had been employed by Independent I. Independent II is engaged in the same type of business as Independent I had been engaged in.

Based on this, as well as other factors, Local 669 alleges that Independent II is the successor corporation of Independent I. Local 669 further alleges that the 1987 Settlement Agreement has been breached by Moore Pipe, Independent I and Independent II. Local 669 has demanded that the parties proceed to arbitration over the dispute. Independent II has refused to arbitrate, arguing that it is neither a signatory to the 1987 Settlement Agreement, nor a successor corporation of Independent I. Independent I and Moore Pipe assert that the dispute is not arbitrable as to them, and that they should not be parties to any arbitration.

I. STANDARD OF REVIEW FOR MOTION FOR SUMMARY JUDGMENT

A district court's review of a case on a motion for summary judgment is governed by Fed. R. Civ. P. 56. A moving party discharges its burden on a motion for summary judgment by "showing" or "pointing out" to the district court that there is an absence of evidence to support the nonmoving party's case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Rule 56 permits the moving party to discharge its burden with or without supporting affidavits and to move for summary judgment on the case as a whole or on any claim. *Id.* When a moving party has so discharged its burden, the nonmoving party must then "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions of file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324.

The district court must enter summary judgment "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

Id. at 322; Fed. R. Civ. P. 56(c). *See also Reflectone, Inc. v. Farrand Optical Co., Inc.*, 862 F.2d 841, 843-44 (11th Cir. 1989). Whether or not the moving party has met its burden of establishing that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law, requires the court to draw inferences from the evidence as viewed in the light most favorable to the nonmoving party, and to resolve all reasonable doubts in that party's favor. *See Spence v. Zimmerman*, 873 F.2d 256 (11th Cir. 1989). The Eleventh Circuit Court of Appeals explained the reasonableness standard in *WSB-TV v. Lee*:

> In deciding whether an inference is reasonable, the court must "cull the universe of possible inferences from the facts established by weighing each against the abstract standard of reasonableness." *Southway Theatres, Inc. v. Georgia Theatre Co.*, 672 F.2d 485, 493 (5th Cir. Unit B 1982).
>
> The opposing party's inferences need not be more probable than those inferences in favor of the movant to create a factual dispute, so long as they reasonably may be drawn from the facts. When more than one inference reasonably can be drawn, it is for the trier of fact to determine the proper one.

WSB-TV v. Lee, 842 F.2d 1266, 1270 (11th Cir. 1988).

Rule 56(c) requires the district court to deny a motion for summary judgment if the court finds that there exists a genuine issue for trial. What constitutes a "genuine issue for trial" was addressed by the Supreme Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). In *Anderson*, the Court stated that "summary judgment will not lie if the

dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The court further stated that the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52.

II. THE INSTANT MOTIONS FOR SUMMARY JUDGMENT

A. The Parties' Contentions

In the Plaintiff's Conclusions of Law, filed on January 11, 1991, it alleges that there is a pending labor dispute between the parties, and that despite the terms of the 1987 Settlement Agreement, Moore Pipe and Independent I have refused to arbitrate the dispute. Local 669 also alleges that Independent II is a successor corporation to Independent I, and that Moore Pipe and Independent I surreptitiously aided and abetted its formation as such.[2] According to Local 669, Independent II has been performing work within Local 669's territorial jurisdiction in violation of the settlement agreement and the collective bargaining agreement between Local 669 and Moore Pipe. Local 669 seeks to have the Court order Moore Pipe and Independent I to arbitrate the labor dispute as provided for in the 1987 Settlement Agreement, and also order Independent II to

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[2]Although the Complaint alleges that Independent II is either the alter ego of and/or the successor to Independent I, the issue of alter ego status is not raised by the plaintiff in either its motion for summary judgment, or its subsequent conclusions of law. Therefore, although the defendants briefed the issue of alter ego status, the Court will not address it in this Order.

arbitrate the dispute based on its status as a successor corporation of Independent I, as defined by federal labor common law.[3]

Moore Pipe and Independent I, in their conclusions of law, filed on January 11, 1991, argue that Independent II is not a successor to Independent I, and therefore should not be compelled to arbitrate with Local 669. Based on that premise, they argue that there is no basis to order either of them to arbitrate with Local 669.

If the Court finds that Independent II is a successor corporation of Independent I, Moore Pipe and Independent I contend that Independent I should not be compelled to arbitrate because it is the predecessor of, rather than the successor to, Independent II. Federal labor policy, they argue, does not support compelling the predecessor, as well as the successor, to arbitrate. Furthermore, they argue, Independent I has not been in business since October, 1987, has no assets and no employees whom Local 669 purports to represent who might benefit from arbitration.

As for Moore Pipe's obligation to arbitrate, they point out there is no allegation that it is a successor to Independent I. Likewise, Local 669 does not seek to assert any rights of Moore Pipe employees. Moore Pipe contends that in order for it to be subject to arbitration, there must be a finding by the Court that the particular dispute in question

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[3]Local 669 also seeks to have Independent II's Counterclaim for abuse of process dismissed either because it fails to state a claim for which relief can be granted, or lacks any factual support in the record, entitling the plaintiff to summary judgment on this issue. The Court will address Independent II's Counterclaim for abuse of process in Subsection E.

is arbitrable as to Moore Pipe. Moore Pipe argues it is, at best, a peripheral defendant in the action.[4]

Independent II, in its conclusions of law, filed on January 14, 1991, argues that it is not a successor to either Independent I or Moore Pipe.

The Court must decide if the Settlement Agreement obligates Moore Pipe and Independent I to arbitrate the instant dispute, as the Local 669 contends. The Court must then decide if Independent II is the successor to Independent I, and as such, is also obligated to arbitrate the dispute.

B. Moore Pipe and Independent I's Duty to Arbitrate

The Labor Management Relations Act of 1947, provides that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." 29 U.S.C. §173(d) (1988). "[W]here the contract provides grievance and arbitration procedures, those

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[4]The Court is surprised by Moore Pipe's desire not to participate in any Court ordered arbitration. The Settlement Agreement provides that:

> the remedy for a violation by *any* employer party hereto *shall* include, but not be limited to, double the full amount of settlement referred to in para. 3 above becoming *immediately* due and owing to Local 669, interest, any actual damages which can be proven by Local 669 as arising from either the August 7, 1985 grievance or the breach of this settlement, or both.

Stipulation of Facts, Exhibit A at 3, para. 7, filed on December 18, 1990. Unless Moore Pipe participates in any Court ordered arbitration, it would not be in a position to advocate its position or defend itself.

procedures must first be exhausted and courts must order resort to the private settlement mechanisms without dealing with the merits of the dispute." *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 37 (1987).

"The Congress ... has by §301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate."[5], [6] *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). "[T]he judicial inquiry under §301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance." *Id.* "An order to arbitrate the particular grievance should not be denied unless it may be said with assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Id.* at 582-83. "In the absence of any express provision excluding a particular grievance from arbitration ... only the

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[5]Section 301(a) of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U.S.C. §185(a) states:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter ... may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. §185(a) (1988).

[6]Settlement agreements are considered contracts within the meaning of §301. *Retail Clerks Int'l Ass'n v. Lion Dry Goods*, 369 U.S. 17, 27 (1962).

most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *Id.* at 584-85.

In the instant case, Local 669 brought suit pursuant to Section 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §185. Complaint at 2, ¶1, filed November 8, 1989. Local 669 alleges that jobs are being performed in its territory in contradiction to the terms and conditions of the Local 669 collective bargaining agreement and/or the 1987 Settlement Agreement.[7] It alleges in Count II that Moore Pipe, Independent I and Independent II violated and continue to violate paragraph seven of the Settlement Agreement and articles three and twenty-five of the collective bargaining agreement "which are mandatory and which require Local 669 and defendants to refer all issues in dispute for final and binding arbitration." *Id.* at 8-9, ¶22.

Paragraph seven of the Settlement Agreement provides for informal and amicable attempts to resolve disputes. If that approach proves unsuccessful, the Settlement Agreement goes on to provide "[t]he unresolved issues shall be promptly referred to the Special Arbitrator pursuant to Article 3 of the Local 669/N.F.S.A. Agreement, for final and binding arbitration under Article 25 of the Agreement." *Id.* Exhibit A at 3, ¶7.

There was correspondence between the parties as early as March, 1989, concerning the instant dispute. Local

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[7]In Count I, Local 669 seeks an award of monetary damages for the alleged violation of the Settlement Agreement. The parties stipulated that the issue of monetary damages, if any, is an issue to be resolved by the arbitrator rather than the Court should the Court find that arbitration is appropriate in this case. Therefore, the Court will not address Count I of the Complaint.

669, in a letter to Jerry Evans of Moore Pipe, sought information regarding alleged jobs being performed in its territory not in accordance with the terms and conditions of the Local 669 collective bargaining agreement and/or the 1987 Settlement Agreement. A similar, though more explicit request for information was made by Local 669 in April, 1989, in a letter addressed to both Jerry Evans, as President of Moore Pipe, and Randy Evans, as representative of Independent I and Independent II. At Local 669's request, the parties met in October, 1989, and attempted to resolve this dispute by informal discussions. That effort proved unsuccessful.

Arbitration was the vehicle identified by the parties as the preferred method of dispute resolution, should informal discussions prove unsuccessful. Therefore, the Court is obligated to determine whether the instant dispute is arbitrable under the parties' agreement.

Local 669 contends that Independent II has been performing work within Local 669's territorial and trade jurisdiction in violation of the Settlement Agreement and the collective bargaining agreement between Local 669 and Moore Pipe. It further alleges that Moore Pipe and Independent I violated the terms of the collective bargaining agreement and the Settlement Agreement, by surreptitiously aiding and abetting the formation of Independent II. These allegations go to the heart of the Settlement Agreement.[8] The Court finds that the instant dispute is appropriate for

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[8]The Settlement Agreement was executed to resolve earlier allegations by Local 669, that Moore Pipe and Independent I were single or joint employers within the meaning of Article Three of the collective bargaining agreement with Moore Pipe, and as such, the economic terms of the agreement were applicable to work performed by Independent I within Local 669's territorial jurisdiction.

arbitration, based on the provisions of the Settlement Agreement. The Court further finds that there is no genuine issue of material fact, and that Local 669 is entitled to judgment, on the issue of Moore Pipe and Independent I's obligation to arbitrate, as a matter of law.

The extent of Independent II's violation of the Settlement Agreement, if any, and the extent, if any, of Moore Pipe and Independent I's assistance in the formation of Independent II, goes to the merits of Local 669's claim. The Court will not reach the merits of Local 669's claim. That decision is reserved for the arbitrator. The Court will Order Independent I and Moore Pipe, as parties to the Settlement Agreement, to arbitrate the instant dispute.

C. Is Independent II a successor to Independent I?

The determination whether a new company is a successor to the old company is "primarily factual in nature and is based upon the totality of the circumstances of a given situation." *Fall River Dyeing & Finishing Co. v. National Labor Relations Bd.*, 482 U.S. 27, 43 (1987). The focus is "on whether the new company has 'acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations.'" *Id.*, (quoting *Golden State Bottling Co. v. National Labor Relations Board*, 414 U.S. 168, 184 (1973).

"The focus is on whether there is 'substantial continuity' between the two enterprises." *Id.* The factors to be considered include: (1) whether the business of both employers is essentially the same; (2) whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and (3) whether the new entity has the same production process, produces the same products, and basically has the same body

of customers. *Id.* In conducting this analysis, it is important to consider "whether 'those employees who have been retained will understandably view their job situation as essentially unaltered.'" *Id.* (quoting *Golden State Bottling Co.*, 414 U.S. at 184.)

In the instant case, it has been stipulated that Independent II is engaged in the same type of business as Independent I. The names of the two enterprises are practically identical -- Independent Sprinkler & Fire Protection Co., and Independent Sprinkler Corporation. They existed at the same business address during Independent I's phase-out period.[9] When incorporated in August, 1987, Independent II's address was 5262 Longleaf Street, Jacksonville, Florida. That is the same address as Independent I.[10] When Independent II began active operations in November, 1987, it was located at 5863 West Beaver Street, Jacksonville, Florida.

From at least April 16, 1987, until October 29, 1987, Randy Evans was a Director, as well as the President and Treasurer of Independent I. During the same time period, Robert Matthews was a Director and the Vice President of Independent I. They resigned their respective positions on

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[9]In mid-summer 1987, Mack Evans, Jr., in his capacity as Chairman of the Board of Williamson, decided to close down the operations of Independent I. This decision was made several months after Independent I and Moore Pipe entered into the Settlement Agreement with Local 669. The decision to close down Independent I was allegedly based on economic reasons. Independent I ceased active business operations on October 30, 1987.

[10]From April, 1987, until October, 1988, Moore Pipe conducted its business from offices located at 5262 Longleaf Street, Jacksonville, Florida. In October, 1988, Moore Pipe moved to its present location at 4517-2 Appleton Avenue, Jacksonville, Florida.

October 30, 1987, at 12:01 a.m. Since its incorporation in August, 1987, Randy Evans has served as a Director and President of Independent II. Likewise, Robert Matthews has served as a Director and the Vice President of Independent II. For several months, both men served Independent I and Independent II in the same capacity. The other six directors of Independent II were not formerly directors of Independent I.

On Friday, October 30, 1987, Independent I ceased its active business operations. All of Independent I's employees were laid off at the end of that day. Independent II began its active business operations on Monday, November 2, 1987, the next business day. Of the thirty-five individuals initially employed by Independent II, thirty-two had previously been employed by Independent I. As of May, 1988, six months after active operations began, Independent II still employed thirty-five individuals, twenty-five of whom were previously employed by Independent I.[11] In 1987, Independent I employed a total of 142 persons.

Subsequent to the formation of Independent II, Robert Matthews negotiated with Independent I for the purchase of various items of office equipment and supplies. The sale of those item was consummated. On or about October 5, 1987, Independent II assumed the commercial leases on some, but not all, of the vehicles which had previously been leased by Independent I. Additionally, during the phase-out period of Independent I, Independent II negotiated with Independent I for the right to complete certain construction jobs originally contracted to Independent I. On November 2, 1987, Independent I entered into an agreement with Independent II,

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[11]Twenty-five of the thirty-five individuals employed by Independent II are field employees.

under which it subcontracted to Independent II the right to complete thirty-seven jobs. Independent II agreed to complete the jobs for the remaining amount of earnings on each job, the total of which equalled $553,896.53.[12]

While it is true that Independent II did not acquire the plant or real property of Independent I, as had been the case in *Fall River Dyeing*, the instant companies are not manufacturers of goods, but rather perform a service for their customers. This service is performed, at least in part, at the customer's site. Of the thirty-five individuals employed by Independent II, more than two-thirds of them are field employees, indicating that a good portion of the activities of the enterprise do not occur at a fixed plant.

Independent II has not at any time owned jointly or in common any bank accounts, notes, bonds and/or other types of securities with Independent I. Additionally, the two enterprises have had different ownership. Independent I was the wholly owned subsidiary of Williamson. Williamson, prior to October 30, 1987, was owned in equal shares by Mack, Randy and Jerry Evans, and the Evans family trust. On October 30, 1987, Randy Evans sold all his interest in Williamson back to the company. The stock of Independent II, since its formation until the present, has been owned by fifteen different individuals, one of whom is Randy Evans. He owns the largest block of stock, approximately nineteen percent. Robert Matthews owns approximately eighteen percent.

After considering the factual circumstances of the instant case, the Court finds that there was substantial

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[12]Moore Pipe entered into a similar agreement with Independent I, whereby it subcontracted to complete forty construction jobs, for the total remaining unpaid contract price of $ 1,025,044.75.

continuity between the two enterprises. There is no disagreement that the business of the two enterprises is identical. While Independent II did not hire the majority of Independent I's workforce, the overwhelming majority of Independent II's workforce was previously employed by Independent I. Independent II began active operations the next business day after Independent I ceased active operations. Independent II, as subcontractor, was authorized to complete thirty-seven of Independent I's construction contracts. Former Independent I employees working on those thirty-seven projects, as well as other projects obtained by Independent II, could understandably view their job situation as essentially unaltered. Based on the totality of the circumstances, the Court finds that Independent II is a successor corporation to Independent I.

D. Duty of Independent II to Arbitrate

In determining national labor policy, the interests of employers must be weighed against the interests of their employees. "The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship." *Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 549 (1964).

In *Wiley*, the United States Supreme Court used the successorship doctrine to impose upon an employer an obligation to arbitrate disputes under an arbitration clause in an agreement entered into between a predecessor employer and the bargaining representative of the latter's employees. "While the principles of law governing ordinary contracts would not bind to a contract an uncontesting successor to a

contracting party, a collective bargaining agreement is not an ordinary contract." *Id.* at 550.

Although the duty to arbitrate must be founded on a contract, the policy considerations favoring arbitration are not wholly overborne by the fact that the successor corporation did not sign the contract being construed. *Id.* "The transition from one corporate organization to another will in most cases be eased and industrial strife avoided if employees' claims continue to be resolved by arbitration rather than by 'the relative strength ... of the contending forces.'" *Id.* at 549 (quoting *Warrior & Gulf*, 363 U.S. at 580). However, "[t]here may be cases in which the lack of any substantial continuity of identity in the business enterprise before and after a change would make a duty to arbitrate something imposed from without, not reasonably to be founded in the particular bargaining agreement and the acts of the parties involved." *Id.* at 551.

In the instant case, Independent II is not a signatory to the 1987 Settlement Agreement. Moore Pipe and Independent I are signatories. The terms of the Settlement Agreement bind the signatories "and the successors, assigns, heirs, trustees and administrators of any party hereto." Stipulation of Facts, Exhibit A at 1, ¶1, filed on December 18, 1990.

The Court finds that Independent II, as the successor to Independent I, is obligated to arbitrate the instant dispute, based on the express provisions of the Settlement Agreement. It is for the arbitrator to determine whether Independent II is liable as a successor corporation pursuant to the Settlement Agreement, as well as to determine the merits of Local 669's contentions. The Court finds that there are no genuine issues of material fact, and that Local

669 is entitled to judgment on the issue of Independent II's obligation to arbitrate, as a matter of law.

E. Abuse of Process

In Count I of its Counterclaim, Independent II seeks a declaratory judgment regarding its rights, liabilities and duties as they pertain to the settlement agreement.[13] Answer at 5, filed on November 20, 1989. In Count II, Independent II alleges that Local 669 "maliciously caused process to be issued against [Independent II] for a purpose and to obtain a result not lawfully warranted or properly obtainable under the circumstances." *Id.* at 8. In support of its contention, Independent II quotes a letter it sent to Local 669 advising that it was not a successor corporation and its reasons for that conclusion. *Id.* at 7-8.

In its conclusions of law, the plaintiff alleges that the Counterclaim for abuse of process is baseless and must be dismissed. The plaintiff argues the "Defendant has adduced no articulable basis for its claim, there are no stipulated facts in support of its claim, and Defendant has failed to sufficiently state its cause of action." Plaintiff's Conclusions of Law at 16, filed on January 11, 1991. Local 669 argues that it is entitled to summary judgment on the counterclaim.

In its response to plaintiff's motion for summary judgment, Independent II contends that Local 669 failed to investigate the truthfulness of its assertion that Independent II was a successor to Independent I. In support of that position, Independent II refers to the deposition testimony of a Local 669 representative, in which he admits that Local

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[13]This Order addresses the obligations of Independent II regarding the Settlement Agreement. Therefore, the Court will not enter a separate declaratory judgment. Count I of the Counterclaim will be dismissed.

669 did not investigate the corporate relationship between Independent I and Independent II prior to filing the instant suit. Independent II also challenges the independent knowledge, regarding the successorship issue, of two of Local 669's potential witnesses.

"'In order to sustain an action for abuse of process two elements are essential, (1) the existence of an ulterior motive; and (2) an act in the use of process other than such as would be proper in the regular prosecution of the charge.'" *Dykes v. A.J. Hosemann*, 776 F.2d 942, 950 (11th Cir. 1985) (Tjoflat, J. concurring in part and dissenting in part) (quoting *McMurray v. U-Haul Co.*, 425 So. 2d 1209, 1209 n.1 (Fla. 4th DCA 1983) (quoting *Farmers Gin Co. v. Ward*, 389 P.2d 9, 11 (1964))). "There is no abuse of process where it is confined to its regular and legitimate function in relation to the cause of action stated in the complaint." *Id.*

The Court finds that Independent II failed to sustain its burden. There has been no showing of an ulterior motive nor any evidence of acts that would be considered improper in the regular prosecution of the charge. It is true that Local 669 has pursued its Complaint with vigor, but that is the nature of litigation and the judicial process at its best. The Court finds that there is no genuine issue of material fact, and that Local 669 is entitled to judgment on the counterclaim, as a matter of law.

IV. CONCLUSION

Having found that all three defendants are obligated to arbitrate the claims of Local 669, as outlined in its Complaint, and having found that Independent II failed to meet its burden on the Counterclaim for abuse of process, the Court will grant Plaintiff's Motion for Summary

Judgment Against Defendants Moore Pipe & Sprinkler Co., Independent Sprinkler & Fire Protection Co. and Independent Sprinkler Corp., filed on September 20, 1990. The Court will deny Defendant Independent Sprinkler Corporation's Motion for Partial Summary Judgment, filed on July 6, 1990, and the Motion for Summary Judgment of Defendants Moore Pipe & Sprinkler Co.[,] and Independent Sprinkler & Fire Protection Co., both filed on September 20, 1990.

Accordingly, it is

ORDERED:

1 That the Plaintiff's Motion for Summary Judgment Against Defendants Moore Pipe & Sprinkler Co., Independent Sprinkler & Fire Protection Co.[,] and Independent Sprinkler Corp., filed on September 20, 1990, is granted; the parties shall proceed to final and binding arbitration.

2. That Defendant Independent Sprinkler Corporation's Motion for Partial Summary Judgment, filed on July 6, 1990, is denied.

3. That the Motion for Summary Judgment of Defendants Moore Pipe & Sprinkler Co.[,] and Independent Sprinkler & Fire Protection Co., filed on September 20, 1990, is denied.

4. That the Clerk of the Court is directed, in accordance with this opinion, to dismiss the Complaint for Breach of Contract and for Final and Binding Arbitration, filed on November 8, 1989; and to dismiss Independent II's Counterclaim, filed on November 20, 1989, and the parties shall proceed to final and binding arbitration.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669 affiliated with the United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, AFL-CIO, Plaintiff-Counter-Claim Defendant-Appellee,

v.

INDEPENDENT SPRINKLER CORP., Defendant-Counterclaim Plaintiff-Appellant.

No. 91-3271

January 7, 1994, Decided

Before KRAVITCH, Circuit Judge, GODBOLD and OAKES, Senior Circuit Judges. (Honorable James L. Oakes, Senior U.S. Circuit Judge for the Second Circuit, sitting by designation.)

GODBOLD, Senior Circuit Judge:

This case concerns the successorship doctrine of labor law. Pursuant to that doctrine an employer found to be a "successor" to a predecessor employer may be bound to collectively bargain with the union that previously had a collective bargaining relationship with the predecessor, and in some circumstances the successor may even be bound by specific provisions of a collective bargaining agreement preexisting between the predecessor and the union.

On stipulated facts the district court granted the union's motion for summary judgment against an employer, Independent II, and denied Independent II's motion for summary judgment.[1] It applied the successorship doctrine, found Independent II to be a successor to employer Independent I, and ordered Independent II to arbitrate a dispute with the union. Because the successorship doctrine does not apply under the facts and circumstances of this case we reverse and direct that the district court enter judgment in favor of Independent II.

The union, Road Sprinkler Fitters Local No. 669, represented the employees of Moore Pipe & Sprinkler Co., a union contractor with which the union had a collective bargaining agreement. A grievance arose over whether Moore Pipe was improperly diverting work to Independent Sprinkler & Fire Protection Co. (Independent I), a non-union contractor. The union filed a §301 suit[2] against Moore Pipe to compel it to arbitrate the grievance as provided in the collective bargaining agreement. A settlement was reached, signed by representatives of the union, Moore Pipe, and

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[1]Independent's II's motion sought judgment in its favor with respect to all claims against it. Other defendants filed a separate motion for summary judgment. All motions of defendants were denied at the same time.

[2]Section 301(a) of the Labor Management Relations Act, 29 U.S.C. §185(a). There is §301 jurisdiction because the case concerns a contract--a settlement agreement between an employer and a union. *United Paperworkers Int'l Union v. Int'l Paper Co.*, 920 F.2d 852, 859 (11th Cir.1991); *Retail Clerks Int'l Assn. v. Lion Dry Goods*, 369 U.S. 17, 27, 82 S. Ct. 541, 547, 7 L. Ed. 2d 503 (1962). This court has jurisdiction of the appeal pursuant to 28 U.S.C. §1291, because the summary judgment ordering the parties to arbitrate is an appealable final order. *Thomson McKinnon Securities, Inc. v. Salter*, 873 F.2d 1397, 1399 (11th Cir.1989).

Independent I (though it was not a party to the suit). Its stated purpose was "to protect and preserve for the employees covered by this Agreement all work historically and traditionally performed by them." It provided that all work in the union's territory would be performed by Moore Pipe employees represented by the union. The agreement stated that it was binding on Moore Pipe, Independent I, and "the successors, assigns, trustees and administrators of any party hereto." It provided that any unresolved issue arising out of the settlement agreement would be referred to arbitration.

Independent Sprinkler Corporation (Independent II) was subsequently organized and operated as a non-union shop, performing the same type of work as Independent I. Allegedly it was awarded contracts for work within the union's territory. The union objected and demanded that Moore Pipe, Independent I, and Independent II submit to arbitration pursuant to the arbitration provision of the settlement agreement. All three companies declined, and the union filed this suit to require arbitration, alleging that Independent II was "an alter ego and/or a successor" of Independent I. It also claimed breach of contract damages for alleged breach of the settlement agreement and asked specific performance of the agreement as well. The district court dismissed the contract claims and granted summary judgment in favor of the union requiring all three companies to arbitrate. Whether the settlement agreement had been breached was described by the court as an issue left to the arbitrator. All three defendants appealed. Moore Pipe and Independent I have since participated in arbitration, which has been completed, and they have withdrawn their appeals. Left in question is whether the district court correctly held that the successorship doctrine requires Independent II to arbitrate pursuant to the provisions of the settlement agreement. We hold that the successorship doctrine has no

application to this case and reverse the grant of summary judgment in favor of the union and against Independent II.

The district court's decision was not based on a theory that Independent II is a "successor" to Independent I under contract law principles and is therefore bound by the provision of the settlement agreement which said that the agreement is binding on Moore Pipe and Independent I and "the successors, assigns, trustees and administrators" of any party. Rather the court based its decision on the successorship doctrine of labor law which, as a matter of law and without regard to contract law principles, imposes the status of successor on an employer and places certain obligations upon it as such successor.[3]

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[3]This case has been obfuscated by imprecise use of the term "successor." Pleadings, motions and briefs of the parties in the district court shifted at will from discussion, without clear identification, of successorship created by contract and successorship created by operation of labor law principles without regard to contract (and sometimes as though both types of status were the same). The district court dismissed the union's breach of contract claim (i.e., breach of the settlement agreement) and left that issue for the arbitrator. The union has not raised as an issue on appeal the dismissal of its contract claim. The district court only relied upon successorship as created by labor law principles. The union acknowledges that the issue before us concerns successorship under established federal labor law principles and that the district court's decision was based on those principles (Brief pp. 8 and 9).

I. THE UNDERPINNINGS OF THE SUCCESSORSHIP DOCTRINE.

A successor relationship created by labor law principles arises by operation of law and is not dependent upon agreement by the successor that it should have successor status. This labor-law based relationship protects the collective bargaining interests of employees of a predecessor employer who have been employed by a successor employer that has substantial and sufficient continuity with the predecessor. The doctrine is an extension of the presumption in labor law that during the term of a collective bargaining agreement and one year thereafter the certified union is the proper bargaining agent. *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 278-79, 92 S. Ct. 1571, 1577, 32 L. Ed. 2d 61 (1972); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 36-39, 107 S. Ct. 2225, 2232-2234, 96 L. Ed. 2d 22 (1987). The successor is, therefore, required to engage in collective bargaining with the union. This continuation of the obligation to bargain tends to stabilize industrial relations by protecting the employees of the predecessor who have joined the work force of the successor at a peculiarly vulnerable time during which labor relations might be disturbed by actions or policies of the successor employer or of the employees themselves. *Fall River*, 482 U.S. at 38-39, 107 S. Ct. at 2233.

Ordinarily the successor is not bound by substantive provisions of a preexisting collective bargaining agreement between the union and the predecessor. *Id.* at 40, 107 S. Ct. at 2234. For example, it is not obligated to hire the employees of the predecessor (subject to the requirement that it may not discriminate against union-member employees in hiring); it is free to set initial terms on which it will hire employees of the predecessor; and it is not bound to pay the

same wages. *Id.* The "rightful prerogative of owners independently to rearrange their businesses" is preserved. *Id.*

The Seventh Circuit has outlined some of the criteria useful in determining whether one employer is the successor of another:

> [a] there has been a substantial continuity of the same business operations; [b] the new employer uses the same plant; [c] the same or substantially the same work force is employed; [d] the same jobs exist under the same working conditions; [e] the same supervisors are employed; [f] the same machinery, equipment, and methods of production are used; and [g] the same product is manufactured or the same service [is] offered.

Int'l Union of Operating Engineers v. Centor Contractors, 831 F.2d 1309, 1312 (7th Cir.1987) (footnote omitted).

We do not need to analyze in detail the relations between Independent I and Independent II that might be relevant to the *Int'l Union* criteria. Even if some of those criteria are present between these two entities, the successorship doctrine has no application to this case. There has been no collective bargaining *relationship* between the union and Independent I to be "passed on" to Independent II as successor to Independent I. Independent I does not have, and never had, a collective bargaining *relationship* with the union. The only preexisting collective bargaining relationship was between Moore Pipe and the union, and the union does not contend that Moore Pipe is the predecessor of Independent II. The successorship doctrine may not be

utilized to force an alleged successor employer, Independent II, into a collective bargaining relationship in which its alleged predecessor, Independent I, was not a participant.

The union asserts that it is "protecting union-represented Moore Pipe employees from diversion of bargaining unit work to Independent I or its 'successor' [Independent II] during the life of the settlement agreement." The successorship doctrine protects the interests of members of the work force who have transferred from the predecessor employer to the successor employer. Here, in a dispute over allocation of work between employees of a union shop (Moore Pipe) and employees of a non-union shop (Independent II), the doctrine is asserted *against* the interests of transferred employees (who transferred to Independent II from Independent I, which had no bargaining relationship with the union) and *for the benefit* of the work force of Moore Pipe (whose employees have not transferred at all). This stands successorship on its head.

Moreover, the duty that the district court imposed on Independent II as a matter of law is a duty to arbitrate, a duty that arises out of contract. A duty to arbitrate does not arise because a court thinks it is a good thing to require in the circumstances or because national labor policy favors it. A party cannot be required to submit to arbitration a dispute that it has not agreed to arbitrate. *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 582, 80 S. Ct. 1347, 1352, 4 L. Ed. 2d 1409 (1960).

As we have pointed out, in most respects a successor is only bound to collectively bargain and is not bound to any extent by an existing contract between the union and the predecessor. In some narrow circumstances, however, there may be an exception to the rule that the successor inherits only a duty to bargain and does not inherit a preexisting

collective bargaining contract. If the status of successor arises out of a merger in which the original employer has disappeared and the new employer has hired all of the old employer's workers, the successor may be required to honor an arbitration provision of the preexisting collective bargaining agreement. *John Wiley & Sons, Inc., v. Livingston*, 376 U.S. 543, 548, 84 S. Ct. 909, 913, 11 L. Ed. 2d 898 (1964); *see also Esmark, Inc. v. NLRB*, 887 F.2d 739, 750-51 (7th Cir.1989). In contrast, if there is a mere sale of assets and the predecessor employer remains in business as a viable entity, the successor may not be required to honor the preexisting agreement to arbitrate. *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 257, 94 S. Ct. 2236, 2240, 41 L. Ed. 2d 46 (1974). This is not a *Wiley* case. There has been no merger. Independent II has hired some but not all of Independent I's employees. Independent I had no collective bargaining agreement or relationship with the union. It has hired none of Moore Pipe's employees. The union is not incapable of obtaining arbitration on the issue of alleged diversion of work from Moore Pipe. Its collective bargaining agreement with Moore Pipe contained an arbitration clause, and the federal court ordered Moore Pipe (and Independent I) to arbitrate, and they have done so.

The district court erred in granting summary judgment in favor of the union and against Independent II based upon the successorship issue and in denying Independent II's motion for summary judgment based upon that issue.

II. ALTER EGO.

The union alleged in its complaint that Independent II was required to arbitrate because it was formed as "an alter ego of and/or a successor corporation" to Independent

I ... and is bound by the terms and conditions of the [settlement] agreements ... entered into by Independent I.[4] Independent II, by counterclaim and later in its motion for summary judgment, alleged that it was neither alter ego of nor successor to Independent I. Despite having alleged alter ego status, the union did not raise that issue in its motion for summary judgment or in its proposed conclusions of law submitted in support of its motion. It did not assert alter ego in opposition to Independent II's motion for summary judgment, which alleged that Independent II was not the alter

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[4]The Seventh Circuit has described the distinct differences between alter ego and successorship.

> We begin by noting that the alter ego and successorship inquiries are distinct. Whether one employer is a successor of another depends on a number of factors, some of which were recently enunciated by this court, including whether:
>
> [reciting the factors set out above in text at slip opinion p. 867.]
>
> * * * * * *
>
> By contrast, the alter ego doctrine focuses on "the existence of a disguised continuance of a former business entity or an attempt to avoid the obligations of a collective bargaining agreement, such as through a sham transfer of assets." *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 24 (1st Cir.1983). In sum " 'unlawful motive or intent are critical inquiries in an alter ego analysis....' " *Iowa Express Distribution, Inc. v. NLRB*, 739 F.2d 1305, 1311 (8th Cir.1984) (quoting *Penntech Papers*, 706 F.2d at 24) (comparing alter ego and single employer doctrines).

Int'l Union of Operating Engineers v. Centor Contractors, supra.

ego of Independent I. The district court therefore declined to address the alter ego status as an issue.

> Although the Complaint alleges that Independent II is either the alter ego of and/or the successor to Independent I, the issue of alter ego status is not raised by the plaintiff in either its motion for summary judgment, or its subsequent [proposed] conclusions of law. Therefore, although the defendants briefed the issue of alter ego status, the Court will not address it in this Order.

Opinion and Order, p. 6, n. 2, 1991 WL 64044. The court was correct in its ruling. It could properly treat as abandoned a claim alleged in the complaint but not even raised as a ground for summary judgment. *Cf., Lazzara v. Howard A. Esser, Inc.*, 802 F.2d 260, 269 (7th Cir.1986) (a ground not pressed in the district court in opposition to a motion for summary judgment is to be treated by the district court as abandoned). Moreover, on appeal the union has not raised as an issue the refusal of the district court to consider the alter ego claim. The district court's refusal could not, therefore, be considered as an issue on appeal. *FSLIC v. Haralson*, 813 F.2d 370, 373 (11th Cir.1987); *Self-directed Placement Corp. v. Control Data Corp.*, 908 F.2d 462, 466 (9th Cir.1990); *Cavic v. Pioneer Astro Indus.*, 825 F.2d 1421, 1425 (10th Cir.1987). Alter ego is simply no longer an issue in this case.

For reasons we have set out, Independent II was entitled to summary judgment in its favor on the successorship issue, the only issue remaining in the case.

III. CONCLUSION.

The decision of the district court is REVERSED. The case is REMANDED to the district court with directions to enter a final judgment in favor of Independent Sprinkler Corporation (Independent II).

Denial of Rehearing

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669 affiliated with the United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, AFL-CIO, Plaintiff-Counter-Claim Defendant-Appellee,

v.

INDEPENDENT SPRINKLER CORP., Defendant-Counterclaim Plaintiff-Appellant.

No. 91-3271

April 8, 1994

Before KRAVITCH, Circuit Judge, GODBOLD and OAKES, Senior Circuit Judges. (Honorable James L. Oakes, Senior U.S. Circuit Judge for the Second Circuit, sitting by designation.)

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT

Mandate

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669 affiliated with the United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, AFL-CIO, Plaintiff-Counter-Claim Defendant-Appellee,

v.

INDEPENDENT SPRINKLER CORP., Defendant-Counterclaim Plaintiff-Appellant.

No. 91-3271

Before KRAVITCH, Circuit Judge, GODBOLD and OAKES, Senior Circuit Judges. (Honorable James L. Oakes, Senior U.S. Circuit Judge for the Second Circuit, sitting by designation.)

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be and the same is hereby REVERSED; and that this cause be and the same is hereby REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that plaintiff-appellee pay defendant appellant the costs on appeal to be taxed by the Clerk of this Court.

Entered: January 7, 1994
Issued as Mandate: May 2, 1994

STIPULATION OF FACTS

Plaintiff Road Sprinkler Fitters Local Union No. 669 and Defendants, Moore Pipe & Sprinkler Co., Independent Sprinkler & Fire Protection Co., and Independent Sprinkler Corp., by and through their undersigned attorneys, for purposes of the above-captioned action only, hereby stipulate to the following facts:

1. This action is brought by the Plaintiff Road Sprinkler Fitters Local Union No. 669 (hereinafter "Local 669") against Defendants Moore Pipe & Sprinkler Co. (hereinafter "Moore Pipe"), Independent Sprinkler & Fire Protection Co. (hereinafter "Independent I"), and Independent Sprinkler Corp., (hereinafter "Independent II") pursuant to Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. Section 185, seeking to compel the Defendants to submit to final and binding arbitration the alleged violation of a Settlement Agreement previously entered by Moore Pipe and Independent I in resolution of prior litigation.[5]

2. Local 669 is a national labor organization representing employees engaged in the installation and maintenance of automatic fire protection systems. Its territorial jurisdiction encompasses 48 states, the District of Columbia and Puerto Rico, and includes the states of Georgia and South Carolina but does not include Florida.

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[5]In an alternative count, Local 669 seeks an award of monetary damages for the alleged violation of the Settlement Agreement. However, the parties stipulate and agree that the issue of monetary damages, if any, is an issue to be resolved by the arbitrator rather than the Court should the Court find in the first instance that arbitration is appropriate in this case.

3. Moore Pipe, a Florida corporation, at all times material herein, has been engaged in the business of installing and maintaining fire protection systems in various states including Florida, Georgia, and South Carolina. Moore Pipe was incorporated on June 26, 1926, and has been a union contractor for many years.

4. Independent I, also a Florida corporation, prior to October 30, 1987, was engaged in the business of installing and maintaining fire protection systems in Florida, Georgia and South Carolina. Independent I was incorporated on April 30, 1982, and operated during its existence on a non-union basis.

5. At all times material herein, and at least since approximately 1980, the stock of both Moore Pipe and Independent I has been owned by a parent company, Williamson Feed Mills, Inc. (hereinafter "Williamson"), and Moore Pipe and Independent I both operated as subsidiaries of Williamson. Prior to October 30, 1987, the stock in Williamson was owned by the following members of the Evans family of Jacksonville, Florida in the percentages indicated: H. M. (Mack) Evans, Jr. (25%), Jerry B. Evans (25%), Randolph T. (Randy) Evans (25%), and the Evans family trust (25%).

6. On or about August 25, 1985, Local 669 filed a grievance under Article 3 of its collective bargaining agreement with Moore Pipe alleging that Moore Pipe and Independent I were single or joint employers within the meaning of Article 3 of the Agreement, and that the economic terms of the Agreement were applicable to work performed by Independent I within Local 669's territorial jurisdiction.

7. Local 669 ultimately brought an action to compel arbitration of its grievance, in an action styled Road Sprinkler Fitters Local Union No. 669 v. Moore Pipe & Sprinkler Co., Civil Action No. 85-936-CIV-J-12 (U.S.D.C. M.D. Fla.).

8. On April 16, 1987, a settlement encompassing both the above pending suit to compel arbitration and the underlying grievance was reached. Jerry Evans signed the Settlement Agreement on behalf of Moore Pipe and Randy Evans signed the Settlement Agreement on behalf of Independent I. Williamson was not a party to the suit or to the agreement. A copy of the Settlement Agreement is attached hereto as Exhibit A and incorporated herein.

9. One aspect of the Settlement Agreement, as provided in paragraph 4 thereof, was that Moore Pipe agreed to be bound by the national collective bargaining agreement in effect between the National Fire Sprinkler Association, Inc. and Local 669, for the period April 1, 1988 through March 31, 1991, a copy of which is attached as Exhibit B to Plaintiff's Complaint and incorporated herein.

10. In mid-summer of 1987, the decision was made to close down the operations of Independent I. This decision was made by H. M. (Mack) Evans, Jr., in his capacity as Chairman of the Board of Williamson, for assertedly economic reasons.

11. Shortly after this decision was made, Randy Evans decided to sell his interest in Williamson. These negotiations continued over a period of several months, and culminated in an agreement signed on October 30, 1987, in which Randy Evans sold all of his stock in Williamson back to the Company for $258,814.97. A copy of this Agreement is attached hereto as Exhibit B and incorporated herein.

12. Since October 30, 1987, the stock of Williamson has been owned equally by H. M. Evans, Jr., Jerry B. Evans, and the Evans family trust. Since October 30, 1987, Randy Evans has had no ownership interest in Williamson, Moore Pipe, or Independent I.

13. On August 27, 1987, Randy Evans formed a new Florida corporation named Independent Sprinkler Corporation (hereinafter "Independent II"). A copy of the initial Articles of Incorporation of Independent Sprinkler Corporation, filed with the Secretary of State on August 28, 1987, is attached hereto as Exhibit C and incorporated herein. The Articles of Incorporation listed Independent II's Board of Directors' address as:

5262 Longleaf Street
Jacksonville, Florida

14. After a "phase out" period of several months, Independent I ceased its active business operations on Friday, October 30, 1987, and has not engaged in active business operations since that date. All of Independent I's employees were laid off at the end of the work day on October 30, 1987. A listing of the employees employed by Independent I during 1987 is attached hereto as Exhibit D and incorporated herein.

15. Independent II began its active business operations on Monday, November 2, 1987 from the following business address and telephone number:

5863 West Beaver Street
Jacksonville, Florida 32205
(904) 781-8227

When Independent II began operations, it employed 35 employees. Thirty-two of these employees previously had been employed by Independent I. A listing of Independent II's employees as of November 6, 1987 is attached hereto as Exhibit E and incorporated herein. As of May 6, 1988, Independent II still employed 35 employees, 25 of whom previously had been employed by Independent I. A listing of Independent II's employees as of May 6, 1988 is attached hereto as Exhibit F and incorporated herein.

Independent I employed 142 personnel during the year 1987. During its existence, Independent II has hired 32 of the personnel who were in the employ of Independent I during the year 1987.

16. On April 16, 1987, the Officers and Directors of Independent I were as follows:

Directors	Officers
Randolph T. (Randy) Evans	Randolph T. (Randy) Evans President and Treasurer
H. M. Evans, III	Robert Matthews Vice-President
Robert Matthews	H. M. Evans, III Secretary

On or about October 23, 1987, Randy Evans and Robert Matthews submitted written letters of resignation from their positions with Independent I, to be effective as of October 30, 1987 at 12:01 a.m.

17. Since October 30, 1987, although Independent I has not engaged in any active business operations, it has

remained as a dormant Florida corporation. Since October 30, 1987, the Officers and Directors of Independent I have been as follows:

Directors	Officers	
Bradford B. Evans	Bradford B. Evans	President
H. M. Evans, III	H. M. Evans, III	Secretary & Treasurer
James W. Carr		

18. From its formation until the present, the Officers and Directors of Independent II have been as follows:

Directors	Officers
Randolph T. (Randy) Evans	Randolph T. (Randy) Evans President
Robert Matthews	Robert Matthews Vice-President
R. Tucker Evans, Jr.	R. Tucker Evans, Jr. Vice-President
Danny Wilkinson	
David Overman	
Jimmy Grey	
Bill Taylor	
Norman LaRochelle	

19. From April 16, 1987 until the present, the Officers and Directors of Moore Pipe have been as follows:

Directors	Officers	
Jerry M. Evans	Jerry B. Evans	President
Jerry B. Evans	H. M. Evans, Jr.	Vice-President, Secretary, Treasurer
H. M. Evans, Jr.	William H. Steedley	Vice-President

20. From its formation until the present, the stock of Independent II has been owned by the following individuals: Randy Evans (approximately 19%), Robert Matthews (approximately 18%), R. Tucker Evans, Jr. (approximately 8% to 9%), and the following employees or former employees of Independent II (each of whom owns or owned stock ranging from approximately 5% to 10%): Dannie Wilkinson, Jimmy Roberts, Robert Bollo, Don Thomas, Norman LaRochelle, David Overman, John Swanson, Jimmy Grey, Bill Taylor, Albert Turner, Louis Sweat and James D. Sweat.

21. From April 16, 1987 until approximately October of 1988, Moore Pipe conducted its business from its offices located at the following address:

5262 Longleaf Street
Post Office Box 40589
Jacksonville, Florida 32203
(904) 768-2556

In approximately October of 1988, Moore Pipe moved to its present business location at the following address:

4517-2 Appleton Avenue
Post Office Box 7419
Jacksonville, Florida 32238-0419
(904) 384-6500

22. From April 16, 1987 until it ceased operations on October 30, 1987, Independent I conducted its business from its offices located at the following address:

5262 Longleaf Street
Post Office Box 2781
Jacksonville, Florida 32203
(904) 765-3572

23. Subsequent to the formation of Independent II, Robert Matthews, Vice-President of Independent II, negotiated with Independent I for the purchase of some, but not all, of Independent I's office equipment and supplies. Pursuant to such negotiations, an agreement was entered into whereby Independent II agreed to purchase from Independent I various items of office equipment and supplies for prices agreed upon by the parties. A copy of the items purchased and the prices agreed upon is attached hereto as Exhibit G and made a part hereof.

24. Subsequent to the formation of Independent II, and as Independent I was phasing out its operation, representatives of Independent II negotiated for the completion of 37 construction jobs originally contracted to Independent I. Following such negotiations, Independent I entered into an agreement dated November 2, 1987, under which it subcontracted various contracts to Independent II.

A copy of such agreement is attached hereto as Exhibit H and made a part hereof. The terms of such agreement were similar to other subcontract agreements which Independent I had drafted with other subcontractors. Independent II completed each of the contracts listed on Exhibit H for the amounts as set forth for each job on the percentage of completion schedule attached to Exhibit H. There were no jobs included in Exhibit H located in Georgia or South Carolina that were not also listed in the jobs included in Attachment A to the Settlement Agreement herein (Exhibit A).

25. A similar agreement as that attached as Exhibit H was entered into between Independent I and Moore Pipe, with respect to the remainder of Independent I's pending jobs. A listing of these jobs, which were subcontracted for completion to Moore Pipe and which were completed by Moore Pipe (and which were all located in South Florida) is attached hereto as Exhibit I and made a part hereof.

26. Subsequent to November 2, 1987, Independent II submitted various orders for the fabrication of materials to the Moore Pipe shop. Pursuant to such orders, Moore Pipe fabricated such materials and Independent II paid the normal retail price for such fabricated materials. Moore Pipe fabricated and sold such materials to Independent II on a "collect on delivery" basis.

27. In early 1988, Robert Matthews, Vice-President of Independent II, entered into further discussions with Moore Pipe concerning the purchase of various items of fabrication equipment. Following such discussions, Moore Pipe sold various items of fabrication equipment to Independent II for prices negotiated between Moore Pipe and Independent II and requiring the payment of cash.

Independent II declined to purchase other items of fabrication equipment being offered for sale by Moore Pipe.

28. Subsequent to the formation of Independent II, and on or about October 5, 1987, Independent II assumed the commercial leases on some, but not all, of the vehicles which previously had been leased by Independent I. Copies of these leases are attached hereto as Exhibit J and incorporated herein.

29. Subsequent to November 2, 1987, Moore Pipe and Independent II have bid upon various construction projects, inside and outside of Florida, on a competitive basis. In various instances, Moore Pipe was not awarded a contract of construction on certain projects in which Independent II was the successful bidder, and in other instances, the reverse has been true. Moore Pipe has not at any time submitted a joint bid for the performance of a contract of construction with Independent II.

30. Since November 2, 1987, Independent II has bid upon and been awarded various construction contracts in Florida, Georgia and South Carolina. Such contracts have been performed on a non-union basis, at wages and benefits set by Independent II.

31. Independent II is engaged in the same type of business as Independent I was.

32. Independent II has not at any time owned jointly or in common any bank accounts, notes, bonds and/or other types of securities with Moore Pipe or Independent I.

33. The dispute giving rise to the current litigation was begun by a letter dated March 21, 1989, from H. V. Simpson, Business Manager for Local 669, to Jerry Evans

of Moore Pipe, requesting certain information as to alleged jobs being performed within Local 669's territory not in accordance with the terms and conditions of the Local 669 collective bargaining agreement. A copy of said letter is attached hereto as Exhibit K and incorporated herein. In response, Jerry Evans submitted a letter dated March 28, 1989 to H. V. Simpson, a copy of which is attached hereto as Exhibit L and incorporated herein. H. V. Simpson then submitted an additional letter to both Jerry Evans and Randy Evans, dated April 7, 1989, a copy of which is attached hereto as Exhibit M and incorporated herein.

34. Local 669 next responded through its attorneys, by letter dated July 25, 1989 from William W. Osborne, Jr., Esquire to Jerry Evans and to Randy Evans, a copy of which is attached hereto as Exhibit N and incorporated herein, and alleged that the Settlement Agreement had been breached by Moore Pipe, Independent I and Independent II. In response, Jerry Evans submitted a letter to William W. Osborne, Jr., Esquire, dated August 4, 1989, a copy of which attached hereto as Exhibit O and incorporated herein. The parties met in an effort to resolve Local 669's allegations in Jacksonville, Florida in October, 1989, but were unable to do so. Moore Pipe, Independent I and Independent II disputed Local 669's allegations, asserting that there was no corporate relationship between Independent I and Independent II.

35. From August 16, 1987 until the time that Independent I ceased operations on October 30, 1987, Independent I did not bid upon any jobs within Local 669's territorial jurisdiction, and did not perform work on any jobs within Local 669's territorial jurisdiction with the exception of those jobs listed as Attachment A to the Settlement Agreement herein (Exhibit A).

36. From October 16, 1987 until the present, and for the purposes of this litigation, all jobs performed by Moore Pipe within Local 669's territorial jurisdiction have been performed with bargaining unit employees represented by Local 669 and in accordance with the wages, terms and conditions of the National Local 669/N.F.S.A. Agreement (attached as Exhibit B to the Complaint).

37. Local 669 has demanded that the parties proceed to arbitration over the dispute herein. Independent II has refused to proceed to arbitration on the asserted basis that it is not the successor to nor alter ego of Independent I and is therefore not bound to the terms of the Settlement Agreement. Independent I and Moore Pipe have asserted that, assuming arguendo arbitration is appropriate in this proceeding at all, the dispute herein is not arbitrable as to them and that they should not be parties to any arbitration.

(2)

Supreme Court, U.S.
FILED
AUG 10 1994
OFFICE OF THE CLERK

No. 94-0053

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, affiliated with the United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, AFL-CIO,

Petitioner,

v.

INDEPENDENT SPRINKLER CORP.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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22 pp

QUESTIONS PRESENTED

1. Does the Eleventh Circuit's decision conflict with decisions of other circuits regarding a successor employer's duty to arbitrate under an agreement with the predecessor's union?

2. Is the Eleventh Circuit's decision contrary to a majority of the circuit courts with respect to the interpretation and scope of section 301?

3. Does the Eleventh Circuit's decision conflict with the precedent of the Court regarding the method for determining work-force continuity in successorship cases?

PARTIES BELOW

The Plaintiff and Appellee in the proceedings below was:

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, affiliated with the United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, AFL-CIO.

The Defendant and Appellant in the proceedings below was:

Independent Sprinkler Corp.

The following companies were Defendants in the proceedings before the District Court and appealed from the District Court Order, but withdrew their appeals and did not participate in the proceedings in the Court of Appeals:

Moore Pipe & Sprinkler Co.
Independent Sprinkler and Fire Protection Co.

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3. Does the Eleventh Circuit's decision conflict with the precedent of the Court regarding the method for determining work-force continuity in successorship cases? i

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No. 94-0053

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, affiliated with the United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, AFL-CIO,

Petitioner,

v.

INDEPENDENT SPRINKLER CORP.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The petition should be denied because the Judgment of the United States Court of Appeals for the Eleventh Circuit does not conflict with decisions of other circuits or the Court, and does not otherwise provide a basis for this Court to review the decision below.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is reported at 10 F.3d 1563 and is reproduced in the appendix to the Petition for Writ of Certiorari beginning at page 21a. The decision of the United States District Court for the Middle District of Florida is reported at 136 L.R.R.M. 2693 and is reproduced at page 1a of the appendix.

STATUTE INVOLVED

29 U.S.C. § 185(a):

(a) **Venue, amount, and citizenship.** Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

In its complaint, the Petitioner (the "Union") alleged that Independent Sprinkler and Fire Protection Co. ("Independent I"), Moore Pipe & Sprinkler Co. ("Moore Pipe") and Respondent, Independent Sprinkler Corp. ("Independent II") violated certain terms of the Settlement Agreement entered into between the Union, Moore and Independent I.[1] [App. 35a]. While Independent II is not a

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[1] In its brief to the Eleventh Circuit, Respondent referred to Independent Sprinkler and Fire Protection Co. as "ISFP" and to itself as "Independent." In this Brief in Opposition, Respondent will refer to such

party to the Settlement Agreement, the Union alleges that Independent II is liable to the Union under the Settlement Agreement as a "successor corporation."

Moore Pipe is a Florida corporation which was incorporated in 1926 engaged in the fire protection business, and has been a union contractor for many years. [App. 36a]. Independent I was a Florida corporation in the business of fire protection contractor with its principle place of business in Jacksonville, Florida operating on a non-union basis. [App. 36a]. Independent II was incorporated in Florida in August, 1987, and like Independent I, is a non-union fire protection contractor. [App. 38a]. Moore Pipe and Independent I were owned by Williamson Feed Mills, Inc. ("Williamson"), which in turn was owned by Mack Evans, Jr (25%), Jerry B. Evans (25%), Randy T. Evans (25%) and the Evans Family Trust (25%). [App. 36a]. In April, 1987, the Officers and Directors of Independent I were as follows:

Directors	Mack Evans (Chairman of the Board)
	Randy Evans
	Robert Matthews

Officers

President/Treasurer	Randy Evans
Vice President	Robert Matthews
Secretary	Mack Evans

---

parties as Independent I and Independent II, respectively, although Respondent believes that such nomenclature could be misleading in light of the issues involved in this case. As the Eleventh Circuit used Independent I and II in its decision, as the Union has in its Petition, Respondent will do the same for the sake of consistency and to minimize confusion.

In the summer of 1987, Mack Evans, who was Chairman of the Board of Williamson, decided to shut down the operations of Independent I for economic reasons. [App. 37a]. Shortly thereafter, Randy Evans and the other shareholders of Williamson decided to sever their business relationship, and Randy Evans sold his stock in Williamson to the company for approximately $250,000. [App. 37a].

In late August of 1987, Randy Evans formed Independent II, which began active operations in early November, 1987. [App. 38a]. When it commenced operations, Independent II hired 32 former employees of Independent I. [App. 39a]. In 1987 Independent I had 142 employees. [App. 39a]. From its inception and during all times relevant to this case, Independent II was owned by the following persons:

Randy Evans	19%
Robert Matthews	18%
Tucker Evans	9%

The remaining 54% of Independent II was owned by the following employees or former employees:

Robert Bollo	Jimmy Grey
Norman LaRochelle	David Overman
Jimmy Roberts	John Swanson
James Sweat	Louis Sweat
Bill Taylor	Don Thomas
Albert Turner	Danny Wilkinson

Randy Evans was the only owner of Independent II (19%) who previously had an ownership interest in Independent I (25%). Also during this time, the Officers and Directors of Independent II were as follows:

Directors

Randy Evans	Robert Matthews
Tucker Evans	Danny Wilkinson
David Overman	Jimmy Grey
Bill Taylor	Norman LaRochelle

Officers

President	Randy Evans
Vice President	Robert Matthews
Vice President	Tucker Evans

Subsequent to its commencement of operations, Independent II was awarded contracts for projects in Florida, Georgia and South Carolina, which were performed on a non-union basis. [App. 44a]. The Union alleged that the Settlement Agreement was breached by Moore Pipe, Independent I *and* Independent II as a result of Independent II's work in Georgia and South Carolina, and asked the lower court to order the parties to binding arbitration. [App. 35a].

The District Court granted the Union's motion for summary judgment and ordered all parties to binding arbitration. Independent II appealed and the Eleventh Circuit reversed, ordering the District Court to enter judgment in favor of Independent II.

REASONS FOR DENYING THE PETITION

I. The Eleventh Circuit's Decision Does Not Create a Conflict With Respect to a Successor's Duty to Arbitrate.

In its petition, the Union first asserts that the Eleventh Circuit's decision creates a conflict with the Second, Third, Fifth and Seventh Circuits with respect to a successor employer's duty to arbitrate. *Graduate Plastics Co. v. Auto Workers, Dist. 65*, 991 F.2d 997 (2d Cir. 1993); *Operating Engrs. Local 150 v. Centor Contractors, Inc.*, 831 F.2d 1309 (7th Cir. 1987); *Steelworkers v. United States Gypsum Co.*, 492 F.2d 713, 725-27 (5th Cir. 1974), *cert. denied*, 419 U.S. 998 (1974); *Teamsters Local 249 v. Bill's Trucking, Inc.*, 493 F.2d 956 (3d Cir. 1974). To the contrary, a review of these decisions reveals that what the Union asserts as a conflict among the circuits is merely a recognition that under *certain* facts, it *can* be appropriate to require a successor to arbitrate.

In finding that Independent II should not have been required to arbitrate, the Eleventh Circuit properly held

> Ordinarily the successor is not bound by substantive provisions of a preexisting collective bargaining agreement between the union and the predecessor. . . . The "rightful prerogative of owners independently to rearrange their businesses" is preserved.

[App. 25a; *citing*, *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 36-39 (1987)]. The Eleventh Circuit properly followed the precedent of this Court, namely, *Fall River* and *NLRB v. Burns International Security Services,*

Inc., 406 U.S. 272 (1972). As the Court explained in *Fall River*

> We observed in *Burns* that, although the successor has an obligation to bargain with the union, it "is ordinarily free to set initial terms on which it will hire the employees of a predecessor . . . *and it is not bound by the substantive provisions of the predecessor's collective-bargaining agreement.*

107 S. Ct. at 2234 (emphasis added); *accord*, *Southward v. South Cent. Ready Mix Supply Corp.*, 7 F.3d 487, 493-95 (6th Cir. 1993); *Sullivan Industries v. NLRB*, 957 F.2d 890, 895 (D.C. Cir. 1992); *U.S. Can Co. v. NLRB*, 984 F.2d 864, 869 (7th Cir. 1993); *NLRB v. Rockwood Energy & Mineral Corp.*, 942 F.2d 169 (3d Cir. 1991); *EPE, Inc. v. NLRB*, 845 F.2d 483 (4th Cir. 1988); and *New England Mechanical, Inv. v. Laborers Local Union 294*, 909 F.2d 1339 (9th Cir. 1990). Thus, combining the two fundamental principals that (a) the duty to arbitrate is created by contract and (b) a successor ordinarily is not bound by the substantive provisions of the predecessor's contracts, results in the general rule followed by the Eleventh Circuit that a successor will not be obligated to arbitrate disputes arising out of the predecessor's agreements.

The Eleventh Circuit correctly noted, however, that under certain facts and circumstances, a successor may be required to honor the substantive provisions of a predecessor's collective bargaining agreement, including an arbitration provision. This may be the result, for example, when the successorship relationship results from a merger in which the predecessor disappears and the successor hires all of the predecessor's employees. [App 28a]. *John Wiley &*

Sons, Inc. v. Livingston, 376 U.S. 543 (1964); *Esmark, Inc. v. NLRB*, 887 F.2d 739, 750-51 (7th Cir. 1989). The Eleventh Circuit in this case held "[t]his is not a *Wiley* case," finding essentially two fundamental distinctions between this case and *Wiley*. [App. 28a].

First, this case did not involve a merger and "wholesale transfer" of all employees from the predecessor to the successor, as was the case in *Wiley*. In this case, Mack Evans, the Chairman of the Board of the parent corporation of Independent I (and who has never had any direct or indirect interest in Independent II) made the decision to shut down Independent I. [App. 37a]. Randy Evans, Tucker Evans, Robert Matthews and some of the other former Independent I employees, all of whom were essentially unemployed after the closure of Independent I, subsequently started up and began doing business through Independent II, which hired just 32 of Independent I's 142 employees (22%). [App. 39a]. In addition, the only similarity in ownership between Independent I and Independent II was Randy Evans' *minority* ownership in both companies -- 25% and 19%, respectively. [App. 36a, 41a].

The second critical distinction that the Eleventh Circuit drew between this case and *Wiley* and its progeny was the fact that this case does not involve an alleged successor to a union-employer. The rationale and policy underlying the successorship doctrine, as most recently enunciated by this Court in *Fall River*, is not present in this case. A review of the successorship decisions cited by both parties in this case reveals that the purpose of the doctrine is to protect employees represented by a union from being automatically and summarily disenfranchised by a corporate restructuring, sale, merger or reorganization. *See e.g.*, *Fall River*, 107 S. Ct. at 2233.

Thus, a successor has an obligation to bargain in good faith with the union that represented the predecessor's employees. *Fall River*, 482 U.S. at 38-39. Clearly, this concept has no application to the facts of this case involving an alleged successor (Independent II) to a non-union employer (Independent I) that had no collective bargaining relationship with the union. Moore Pipe was the only employer who had a collective bargaining relationship and there is no allegation that Independent II is a successor to Moore Pipe. Rather, as noted by the Eleventh Circuit, the Union's collective bargaining relationship with and remedies against Moore Pipe remain intact. [App. 28a].

Each of the four decisions cited by the Union as being in conflict with the decision below is a case where the circuit court found, based on the facts and circumstances presented, that the case was more similar to *Wiley*, thereby justifying the requirement that the successor arbitrate with the union. Moreover, each decision involved a union's allegation that the employer was the successor to an employer which had a collective bargaining relationship with the union. Thus, the labor law policy of "promot[ing] stability in *collective-bargaining relationships*," was present and further supported requiring the successor to arbitrate. Fall River, 107 S. Ct. at 2233 (emphasis added).

In *Graduate Plastics*, the Second Circuit held that, similar to *Wiley*, all of the predecessor's employees were retained by the successor, the same plant was operated making the same products, the business retained the same name as the predecessor and employee benefits were calculated based on service time with both the successor *and* the predecessor. *Graduate Plastics*, 991 F.2d at 1001. Furthermore, the successor actively participated in the arbitration proceeding and knew of the union's claim at the

time of the sale. The facts of *Graduate Plastics* are admittedly similar to the facts of *Wiley*, however readily distinguishable from the facts of this case, *Burns* and others finding that a successor could not be required to arbitrate pursuant to the predecessor's agreement.

The Union places substantial reliance on *Centor Contractors* as being a case with which the decision below conflicts. [Pet. 10]. Such reliance is misplaced for the following reasons. First, *Centor Contractors* was an action to enforce an arbitration award obtained against the predecessor and *subsequently* sought to be enforced against the successor. 831 F.2d at 1310. Thus, the case did not address the issue of whether the successor should be required to arbitrate.

Second, the circuit court in *Centor Contractors* affirmed the district court's decision of liability under the successorship *and* alter ego doctrines. In this case, the Eleventh Circuit properly found that the Union abandoned its alter ego theory and that the district court expressly declined to address the alter ego theory. And third, the facts in *Centor Contractors* supported the district court's findings that the predecessor and successor were so intertwined as to justify the enforcement of the arbitration award against the successor. The Eleventh Circuit's decision accordingly does not conflict with *Centor Contractors*.

Bill's Trucking likewise does not evidence a conflict created by the Eleventh Circuit's decision. The Third Circuit in *Bill's Trucking* held that an issue of fact remained as to whether the alleged successor could be bound by the predecessor's collective bargaining agreement, thereby reversing the district court's grant of summary judgment in favor of the successor. The court recognized

> [t]his is not to suggest, of course, that in every case a successor employer may properly be held to the provisions of his predecessor's labor contract.

Bill's Trucking, 493 F.2d at 963. That case involved "a simple purchase of stock, followed only by a change in corporate name and some minor changes in business operations." *Id.* In addition, the circuit court in *Bill's Trucking* distinguished *Burns* on the ground that *Burns* was an unfair labor practice and not a suit under § 301 -- a distinction that was expressly dismissed as inappropriate in *Howard Johnson Co. v. Hotel & Restaurant Employees*, 417 U.S. 249 (1974). Thus, neither *Bill's Trucking* nor the other cases cited by the Union evidence a conflict in the circuits as a result of the Eleventh Circuit's decision.[2]

II. The Eleventh Circuit's Characterization of the Underlying Agreement Was Correct and Does Not Conflict with Other Circuits

Beginning at page 14 of its Petition, the Union asserts that the Eleventh Circuit's decision regarding the scope of § 301 "is contrary to a majority of the Circuit Courts and degrades § 301 as a forum for resolving labor disputes." The Union asserts that the Eleventh Circuit incorrectly limited § 301 contracts to collective bargaining agreements,

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[2]The fourth case cited by the Union, *U.S. Gypsum*, is not specifically discussed in the Petition. That case, a 1974 decision prior to numerous cases clarifying the limits of a successor's obligations, is simply another example of a decision finding that based on the particular facts of the case -- the facts being more similar to *Wiley* than *Burns* -- the successor could be required to arbitrate.

rather than using a more expansive interpretation as utilized by the circuits in the cases cited in the Petition.

The Union's argument is erroneous, however, because the Eleventh Circuit *did not* hold that § 301 applies only to collective bargaining agreement. Rather, the court held there was no collective bargaining relationship between the Union and Independent I (which is not disputed) and therefore, there could be no collective bargaining relationship to be "passed on" to Independent II.

With respect to the language of the decision quoted by the Union, when read in context it is clear that the Eleventh Circuit was discussing the concept that the duty of a successor under *Fall River* to "bargain in good faith with the union" clearly cannot apply to a successor of a non-union employer. Common sense alone tells us that a successor to a non-union predecessor cannot have the duty to bargain with the union because there was no collective bargaining relationship between the union and the predecessor -- the predecessor had no duty to bargain with union to begin with. Thus, the Eleventh Circuit properly concluded that

> the successorship doctrine may not be utilized to force an alleged successor employer, Independent II, into a collective bargaining relationship in which its alleged predecessor, Independent I, was not a participant.

[App. 26a]. This aspect of the decision simply holds that the *Fall River* successorship doctrine cannot be utilized to impose a duty to bargain on a successor where the predecessor had no such duty. The doctrine and rationale underlying it, as evidenced by the numerous decisions invoking it, applies to situations involving the duties of a

successor to a union employer. Thus, the Eleventh Circuit did not hold, as urged by the Union, that § 301 applies only to collective bargaining agreements, nor does the decision interject "the precondition of a 'collective bargaining relationship' between the parties upon enforcement of a grievance settlement agreement under § 301.

III. The Decision Below is Consistent with the Precedent of the Court with Respect to the Method for Determining Workforce Continuity

As its third reason for granting the petition, the Union contends that the decision below is contrary to the precedent of the Court and recreates a conflict among the circuits regarding the method for determining workforce continuity for successorship cases. Again, upon reading the language quoted by the Union in context, it is clear that in this regard the Eleventh Circuit merely held that the facts of *this* case did not fall into the exception to the general rule that "a successor is only bound to collectively bargain and is not bound to any extent by an existing contract between the union and the predecessor." [App. 28a].

The Eleventh Circuit noted

> In some narrow circumstances, however, there may be an exception to the rule that the successor inherits only a duty to bargain and does not inherit a preexisting collective bargaining contract.

The court then discussed two situations as a guide in explaining the exception. If the successor employer is a result of a

> merger in which the original employer has disappeared and the new employer has hired all of the old employer's workers, the successor *may* by required to honor an arbitration provision of the preexisting collective bargaining agreement.

(Emphasis added; *citing*, *Wiley* and *Esmark* as illustrative cases). On the other hand (and other end of the spectrum), "if there is a mere sale of assets and the predecessor employer remains in business as a viable entity, the successor may not be required to honor the preexisting agreement to arbitrate". The Eleventh Circuit then properly concludes "[t]his is not a *Wiley* case," which supports the finding that this case falls into the exception to the general rule that "a successor is only bound to collectively bargain and is not bound to any extent by an existing contract between the union and the predecessor."

The Eleventh Circuit did not hold (as would be necessary for the Union's argument to be correct) that in order to be a "successor" with the obligation to bargain in good faith the alleged successor must have hired all of the predecessor's employees. Such wholesale hiring may support the additional imposition of the substantive terms of the predecessor's agreements, but is not the exclusive factor to be considered. To the contrary, the Eleventh Circuit recognized the seven factors that should be considered in determining the successorship issue. [App 26a].

Thus, contrary to the Union's assertion, the decision below does not alter or purport to alter the standard for determining workforce continuity in successorship cases. The language of the decision cited by the Union ("Independent II has hired some but not all of Independent

I's employees") has to do with the Eleventh Circuit's finding that even assuming Independent II is a "*Fall River* successor" (as opposed to a successor under state contract or corporate law, or an alter ego successor) the facts giving rise to the successorship does not render Independent II liable for the substantive terms of Independent I's agreements (such as the provision in the Settlement Agreement requiring arbitration) as an exception to the general rule that a successor is not so liable.

CONCLUSION

The Petition should denied as the Eleventh Circuit's decision does not create a conflict among the circuits and is consistent with prior decisions of this Court.

Respectfully Submitted,

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